Can Voluntary Racial Integration Plans at the K-12 Educational Level Meet *Grutter*'s Constitutional Standard?

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More than fifty years after the U.S. Supreme Court's seminal decision in Brown v. Board of Education, *schools and the societies they serve continue to struggle to desegregate by constitutional means. The 2003* Grutter *decision affirmed that diversity itself can be a sufficiently compelling governmental interest to survive strict scrutiny, opening new opportunities for today's schools to achieve desegregation. The First and Ninth Circuits have relied, en banc, on* Grutter *to allow K-12 school districts to use race as a factor in combating continuing racial segregation in elementary and secondary schools. If courts continue to uphold the use of voluntary racial integration plans in K-12 schools, the* Brown *Court's dream of meaningfully integrated public schools may, finally, become reality in current students' lifetimes.*

I. INTRODUCTION

Just over fifty years ago, the United States Supreme Court authored a critically important opinion that profoundly changed American society. In *Brown v. Board of Education*, the Supreme Court recognized the dramatic impact that education had come to bear on the lives of individual American citizens and our society as a whole as the country moved from isolated farming communities toward industrialization and increasingly diverse commerce.[1] *Brown* pronounced that a segregated education in grade and high schools is inferior to an integrated education and that imposing such an education on students could impact their "hearts and minds in a way unlikely ever to be undone."[2] *Brown* recognized that public education serves a critical role both for individual achievement and for society as a whole:

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[1] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[2] *Id.* at 494.

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[3]

In many ways, the *Brown* decision encapsulates a vision of public education that the Court has consistently recognized in a series of decisions. The Court's vision of public education recognizes the vital government function it serves in assimilating a diverse and largely immigrant population and in inculcating fundamental values of citizenship.[4] Thus, public education is at the forefront of society, helping to shape society, rather than just passively reflecting it.

The Court has repeatedly emphasized education's fundamental role as the very foundation of good citizenship in the United States.[5] Several decisions regarding public education underscore this critical role, ranging from the Court upholding a state law requiring that elementary and secondary teachers be United States citizens,[6] to declaring unconstitutional a state law denying free public education to undocumented aliens,[7] to recognizing the close relationship between education and some of our most basic constitutional values.[8] Each of these decisions rested on public schools' critical role in preparing students for citizenship in our democratic society.[9]

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[3] *Id.* at 493.

[4] Grutter v. Bollinger, 539 U.S. 306, 331 (2003); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Plyler v. Doe, 457 U.S. 202, 221 (1982); Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15–16 (1971); *Brown*, 347 U.S. at 493.

[5] *Grutter*, 539 U.S. at 331; *Fraser*, 478 U.S. at 683; *Plyler*, 457 U.S. at 221; *Swann*, 402 U.S. at 15–16; *Brown*, 347 U.S. at 493.

[6] Ambach v. Norwick, 441 U.S. 68, 80–81 (1979).

[7] *Plyler*, 457 U.S. at 230.

[8] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 30–31 (1973).

[9] *Plyler*, 457 U.S. at 221; *Ambach*, 441 U.S. at 76; *Rodriguez*, 411 U.S. at 30.

A. Grutter v. Bollinger *Reaffirmed the Importance of Educational Diversity*

United States Supreme Court decisions involving the role of public education in our society support yet another overriding factor in *Brown*: when young children interact together in a school setting, racial barriers and stereotypes will be diminished. Without these divisions in the schoolhouse, voluntary integration in housing and other areas of society will follow.[10] In large part, these underlying values were affirmed with the *Grutter v. Bollinger* decision. Despite the historical difficulties in carrying out the missives of *Brown*, the *Grutter* Court recognized that diversity in the educational context is a compelling governmental interest in and of itself.[11] *Grutter* upheld the University of Michigan Law School's admissions process, which considered race as one factor among many.[12]

In *Grutter*, the Court examined overwhelming sociological data from a variety of sources, including corporations, educational institutions, and the United States military. These varied entities not only extolled the virtues of diversity in education, but supported the critical and fundamental *need* for a racially diverse student body in educational institutions.[13] *Grutter*, like *Brown*, recognized that integrated education helps to erode racial stereotypes, advances crossracial understanding, and provides students with the ability to better understand individuals of different races and backgrounds.[14] Ultimately, integrated education better prepares students to enter the diverse communities and workplaces we enjoy today.[15] In this manner, the Court shifted focus from intentional harm or injury to the suspect class to viewing integrated education as an intrinsically valuable goal to be embraced by and equally allocated to all. Although *Grutter* addressed diversity at the graduate school level, these viewpoints and values are equally, if not more, applicable, to K-12 schools.

Fortunately, the *Grutter* decision provides substantial leeway for continuing to apply limited racial considerations in student assignments. Moreover, long-standing jurisprudence in education cases opens new avenues for constitutional arguments within an analysis of K-12 issues. Judicial precedent has established two critical factors in this analysis. First, the courts historically grant educational institutions broad deference to make

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[10] *See* Comfort v. Lynn Sch. Comm., 418 F.3d 1, 29 (1st Cir. 2005) (en banc); *see also Swann*, 402 U.S. at 16.

[11] Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003).

[12] *Id.* at 340–41.

[13] *See id.* at 330–31.

[14] *Id.* at 330.

[15] *Id.*

educational policy decisions, including decisions which relate to the values that schools wish to promote in their curricula and in their student bodies.[16] Second, courts have recognized that the key to proper analysis of constitutional issues in the educational environment is a careful consideration of the unique context that public schools present, and the many ways this impacts the policies that are implemented.[17]

B. *The Applicable Level of Constitutional Review*

Notwithstanding the University of Michigan Law School's laudable goal of achieving diversity, the Supreme Court maintained that good intentions alone do not carry the bar.[18] Where a state actor is employing highly suspect means, such as racial classifications, to effectuate its purportedly benevolent goals, the state must meet the judicial review standard of strict scrutiny.[19] To survive strict scrutiny, the state actor must demonstrate that consideration of race serves a compelling governmental interest and that it is narrowly tailored to use the least restrictive means necessary to further that interest.[20]

Within this framework, *Grutter* opened the door for a whole new era of cases. By recognizing that racially integrated education could be a compelling state interest in and of itself, it paved the way for educational institutions to cease relying on proxies for race and buzzwords for diversity. In *Parents Involved in Community Schools v. Seattle School District, No. 1*, the Ninth Circuit recently affirmed, en banc, that where an educational institution determines that racial integration is a legitimate academic and educational interest, the school district can consider race as arguably the most accurate marker for that interest.[21] To use alternative means to achieve racial diversity creates a greater risk of reliance on racial stereotypes. The First Circuit, en banc, similarly acknowledged the intrinsic educational value of racially diverse K-12 schools in preparing children for good citizenship.[22]

While helpful to usher in new constitutional analyses, *Grutter*'s strict scrutiny analysis may have limited applicability to K-12 schools. The

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[16] *See* Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225 (1985); Milliken v. Bradley, 418 U.S. 717, 743–44 (1974); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973).

[17] *See* Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 655–56 (1995); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 696 (1986) (Stevens, J., dissenting); New Jersey v. T.L.O., 469 U.S. 325, 337–38 (1985).

[18] *See Grutter*, 539 U.S. at 327.

[19] *Id.*

[20] *Id.* at 326.

[21] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1191 (9th Cir. 2005) (en banc).

[22] Comfort v. Lynn Sch. Comm., 418 F.3d 1, 14 (1st Cir. 2005) (en banc).

Supreme Court employed a somewhat rigid framework in determining whether the University of Michigan Law School's means were narrowly tailored. However, it is significant that in analyzing the law school's admissions policy, the *Grutter* Court recognized that the context in which the strict scrutiny test was applied, and the degree to which countervailing interests were involved, significantly impacted the test's application.[23]

The *Grutter* Court's consideration of context is well-established in jurisprudence relating to K-12 schools, particularly in the areas of school desegregation and First and Fourth Amendment issues. As the most stringent level of review, strict scrutiny has been said to be "'strict' in theory and fatal in fact."[24] While this may be true in most settings, the Supreme Court has traditionally scrutinized in a less severe manner when fundamental rights are involved in the K-12 educational setting.[25] The Supreme Court has made it clear that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[26] Indeed, when addressing fundamental issues involving both the First and Fourth Amendments, the Court has upheld actions that would have been struck down outside the school environment.

C. *Using Voluntary Integration Plans to Create School Diversity*

A highly effective way to achieve racial diversity at the K-12 level within the confines of strict scrutiny analysis is the use of voluntary integration plans. The plans rely upon parental choice motivated by incentives, as opposed to mandatory plans in which students are assigned to other-race schools without any parental input.[27] The schools are regular, nonmagnet specialized schools, where assignments would typically be by neighborhood attendance boundaries. However, because neighborhoods tend to be segregated by race and socioeconomic status, a school board can decide to eliminate geographic boundaries and create alternate assignment procedures to assure diversity in all its schools. Numerous examples exist of successfully implemented voluntary integration plans.[28]

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[23] *Grutter*, 539 U.S. at 327–28.

[24] Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).

[25] In the K-12 educational setting, the Supreme Court has allowed administrators to infringe on students' Fourth Amendment rights in *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 655–56 and *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) and students' First Amendment rights in *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 682–83 (1986).

[26] *Fraser*, 478 U.S. at 682.

[27] CHRISTINE H. ROSSELL, THE CARROT OR THE STICK FOR SCHOOL DESEGREGATION POLICY 42–43 (1990).

[28] *Id.* at 187.

As discussed herein, by recognizing the compelling governmental interest served by achieving racially integrated public schools within the unique context of the K-12 environment, voluntary integration plans can be narrowly tailored to satisfy the strict scrutiny test.

II. CONTEXTUAL ANALYSIS OF VOLUNTARY INTEGRATION IN K-12 SCHOOLS

In allowing the law school to consider race in admissions, the *Grutter* Court noted that the context in which a policy will be implemented is highly significant in any strict scrutiny analysis of a race-based government action.[29] Once context is considered as part of strict scrutiny analysis, not every racially influenced decision will be found equally objectionable.[30] This approach allows for consideration of the challenges and complexities of that particular setting and how effective the policy will be given those nuances. Judges can better determine the sincerity behind the government's actions to address the identified compelling government interest by considering the context in which the goals are identified and addressed.

The highly unique environment of K-12 schools is a prime example of why the consideration of context is critical to a strict scrutiny analysis. Not only are schools forced to make policies within an extensive set of constraints, but they do so in an attempt to maximize the unique opportunity they have to further important societal goals and objectives. Chief among these is equipping students with the tools they need to be good citizens.

This importance was illustrated by two recent en banc U.S. Court of Appeals cases which upheld the constitutionality of school districts' desegregation plans using race factors.[31] In *Comfort v. Lynn School Committee*, the First Circuit upheld a plan which took race into account when determining a student's ability to transfer out of a neighborhood school. The *Comfort* court heeded the *Grutter* Court's "admonition that '[c]ontext matters when reviewing race-based governmental action.'"[32] Similarly, in *Parents Involved*, the Ninth Circuit affirmed the importance of context in applying strict scrutiny to a school district's use of race as a tie-breaker to improve racial diversity within Seattle public schools.[33]

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[29] Grutter v. Bollinger, 539 U.S. 306, 327 (2003).

[30] *Id.*

[31] Comfort v. Lynn Sch. Comm., 418 F.3d 1, 23 (1st Cir. 2005) (en banc); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1192–93 (9th Cir. 2005) (en banc).

[32] *Comfort*, 418 F.3d at 13 (citing *Grutter*, 539 U.S. at 327).

[33] *Parents Involved*, 426 F.3d at 1173.

In reaching these decisions, the First and Ninth Circuits were cognizant of the backdrop against which each school district created the desegregation plan: its obligation to prepare students for work and citizenship in an increasingly ethnically and racially diverse world.[34] Both the *Comfort* and *Parents Involved* courts reasoned that the interests of diversity propounded by the *Grutter* Court were equally, if not more, applicable when applied to K-12 schools.[35] The *Comfort* decision explains that:

> There is no reason to believe that these interests . . . are substantially stronger in the context of higher education than in the context of elementary and secondary education. In fact, there is significant evidence in the record that the benefits of a racially diverse school are more compelling at younger ages.[36]

The value of a diverse educational environment identified by the *Grutter* Court as a compelling governmental interest is equally applicable to K-12 education, if not more compelling, at these critical and formative grade levels. The benefits of promoting crossracial understanding and preparing students for an increasingly diverse workplace and society are even more impactful at this early stage of a student's development than at the university level.

Ample sociological research supports the educational policy of actively integrating classrooms and teaching students to become responsible citizens in an increasingly diverse society. State legislation nationwide and frequent judicial precedents reflect these priorities.[37]

In order to best capitalize on the unique opportunity that K-12 schools have to prepare students for citizenship in our multicultural society, it is imperative that local school administrators be allowed the discretion they need to formulate a voluntary integration plan which best suits the needs of their particular school and community.

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[34] *Comfort*, 418 F.3d at 14; *Parents Involved*, 426 F.3d at 1174–75.

[35] *See Comfort*, 418 F.3d at 6; *Parents Involved*, 426 F.3d at 1175–76.

[36] *Comfort*, 418 F.3d at 15–16 (citations omitted).

[37] CAL. EDUC. CODE § 233.5 (West 2002); VA. CODE ANN. § 22.1-208.01 (West 2002); WASH. REV. CODE ANN. § 28A.405.030 (West 1997) (establishing a duty to teach, *inter alia*, humanity and "true comprehension of the rights, duty and dignity" of citizenship); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 681 (1986); Ambach v. Norwick, 441 U.S. 68, 76–77 (1979); GARY ORFIELD & CHUNGMEI LEE, THE CIVIL RIGHTS PROJECT, *BROWN* AT 50: KING'S DREAM OR *PLESSY'S* NIGHTMARE? 22–26 (2004), http://www.civilrightsproject.harvard.edu/research/reseg04/brown50.pdf.

A. *Schools Have an Obligation to Teach Students "Good Citizenship"*

K-12 education plays a vital and unique role in American society. In addition to providing the academic preparation and skills necessary to enable students to pursue gainful employment and access to higher learning, K-12 schools serve the overriding democratic purpose of inculcating basic democratic values and preparing students for "good citizenship."[38] In fact, the *Grutter* Court cited a K-12 case in stressing how the Supreme Court has repeatedly acknowledged the overriding importance of education in preparing students for work and citizenship.[39]

Public education's responsibility, at its core, is to impress the fundamental values of citizenship on the next generation.[40] The Supreme Court has consistently and clearly reaffirmed the principle that public schools and public school teachers play a unique role in promoting and developing citizenship.[41] As previously noted, the Supreme Court in *Ambach v. Norwick* explained, quoting *Brown*, that "[the public school is] the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment."[42] Even *Ambach*'s dissenting Justices agreed "that the inculcation of fundamental values by our public schools is necessary to the maintenance of a democratic political system" while rejecting the majority's decision to uphold a state law requiring U.S. citizenship for K-12 teachers.[43]

1. *Research Supports the Benefits of a Diverse Educational Environment*

Multiple sociological studies show that participation in integrated environments is necessary for participation in a diverse, multicultural society such as ours.[44] The *Grutter* decision cited amicus curiae briefs from both

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[38] *Ambach*, 441 U.S. at 76–77; *see Fraser*, 478 U.S. at 681.

[39] Grutter v. Bollinger, 539 U.S. 306, 331 (citing Plyler v. Doe, 457 U.S. 202, 221 (1982)).

[40] *Ambach*, 441 U.S. at 75–76.

[41] *See generally Plyler*, 457 U.S. at 221; *Ambach*, 441 U.S. at 78; San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–30 (1973); Wisconsin v. Yoder, 406 U.S. 205, 213 (1972); Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954); Pierce v. Soc'y of the Sisters of the Holy Names of Jesus and Mary, 268 U.S. 510, 534 (1925).

[42] *Ambach*, 441 U.S. at 77 (quoting Brown v. Bd. of Educ., 347 U.S. at 493).

[43] *Id.* at 86 n.6 (Blackmun, J., dissenting).

[44] ORFIELD & LEE, *supra* note 37, at 22–26.

corporate America and the United States military to highlight the concrete benefits of diversity in education.[45] The Court stated:

> These benefits are not theoretical but real, as major American businesses have made clear that the skills needed in today's increasingly global marketplace can only be developed through exposure to widely diverse people, cultures, ideas, and viewpoints. What is more, high-ranking retired officers and civilian leaders of the United States military assert that, "[b]ased on [their] decades of experience," a "highly qualified, racially diverse officer corps . . . is essential to the military's ability to fulfill its principle mission to provide national security."[46]

Several studies have focused on the positive impact that desegregation has on students' racial attitudes and social behavior.[47] Such research concludes that *both* white and nonwhite students in racially diverse schools are less racially prejudiced than those in other schools.[48] The studies have also found that an increase in interracial contact among students creates more interracial sociability and friendship.[49]

In particular, a comprehensive study on the recent pattern of school *resegregation* examined the long-term benefits of racially and ethnically diverse schools.[50] As part of his research at Harvard University's Civil Rights Project, Dr. Gary Orfield cited evidence indicating that students who attended desegregated schools were more likely to lead integrated lives as adults, in settings such as higher education, housing, and the workplace.[51] Orfield cites research conducted by Amy Wells and Robert Crain who, after reviewing twenty-one studies, concluded that there is indeed a relationship between school and workplace segregation.[52] On the whole, Orfield found that attending heterogenous schools leads "to a greater ability to work with

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[45] Grutter v. Bollinger, 539 U.S. 306, 330–31 (2003).

[46] *Id.* (alterations in original) (citations omitted).

[47] Jomills H. Braddock & James M. McPartland, *Social-Psychological Processes that Perpetuate Racial Segregation: The Relationship Between School and Employment Segregation*, 19 J. OF BLACK STUD. 267, 285 (1989); Maureen T. Hallinan & Stevens S. Smith, *The Effect of Classroom Composition on Students' Interracial Friendliness*, 48 SOC. PSYCHOL. Q. 3, 13–14 (1985); Amy S. Wells & Robert L. Crain, *Perpetuation Theory and the Long-Term Effects of School Desegregation*, 64 REV. OF EDUC. RES. 531, 552 (1994).

[48] Braddock & McPartland, *supra* note 47, at 285; Hallinan & Smith, *supra* note 47, at 13–14; Wells & Crain, *supra* note 47, at 552.

[49] Hallinan & Smith, *supra* note 47, at 13.

[50] ORFIELD & LEE, *supra* note 37, at 3–4.

[51] *Id.* at 24.

[52] *Id.* at 24–25.

and understand people of backgrounds different than one's own, and to more fully participate in a rapidly changing democratic society."[53]

Desegregation studies generally find that students in racially diverse schools will have positive attitudes and achieve social ties with students from other racial groups, *provided* that the right conditions exist.[54] One study concluded that these conditions include a school climate supportive of cross-racial and cross-ethnic social interactions and structural and organizational features of the school that permit and encourage social interactions.[55] In order to create this atmosphere, it is essential that school districts be allowed the discretion they need to foster such an environment.

2. *State Legislatures Reinforce Teaching Citizenship in Public Schools*

Several states mandate that their public schools provide the building blocks for good citizenship, multicultural awareness, and student preparation for a global workforce.[56] In addition to traditional academics, California's Education Code implores teachers to impart their students with "a true comprehension of the rights, duties, and dignity of American citizenship, and the meaning of equality and human dignity, including the promotion of harmonious relations."[57] California's Education Code clearly contemplates a multicultural educational environment, stating that teachers are "encouraged to create and foster an environment . . . that is free from discriminatory attitudes, practices, events, or activities, in order to prevent acts of hate violence."[58]

California is not alone in considering citizenship lessons to be a strong state interest in an educational system. Washington uses similar language in requiring that teachers instruct students regarding a "true comprehension of the rights, duty and dignity of American citizenship."[59] Virginia's code also stresses the importance of its public school curriculum including instruction regarding civic virtues and basic character traits to improve citizenship and concern for the common good.[60] Colorado goes even further through its state constitution by *requiring* that studies essential to good citizenship be taught

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[53] *Id.* at 26.

[54] *See id.* at 24–26.

[55] *Id.*

[56] CAL. EDUC. CODE § 233.5 (West 2002); VA. CODE ANN. § 22.1-208.01 (West 2002); WASH. REV. CODE ANN. § 28A.405.030 (West 1997).

[57] § 233.5.

[58] *Id.*

[59] WASH. REV. CODE ANN. § 28A.405.030 (1997).

[60] VA. CODE ANN. § 22.1-208.01 (2002).

in the state's public schools.[61] These laws, as well as those in several other jurisdictions, illustrate the high priority which state legislatures place upon teaching students good citizenship.

B. *Schools Must Have Discretion to Formulate Voluntary Integration Plans*

Because education is the foundation of citizenship, school districts must be provided with the discretion to devise programs and student assignment policies that will prepare students to function as tolerant citizens in a racially and culturally diverse society. In grappling with these complex educational issues, *Grutter* recognized the importance of local control over educational policy and acknowledged that courts are not the best entity to make these policies.[62] As a result, *Grutter* gave broad deference to the judgment of school administrators.[63] This deference should extend to the educators' judgment that diversity is of tremendous educational value to students.

1. *History of Discretion Granted to School Districts in Desegregation Litigation*

The history of desegregation litigation strongly reinforces judicial deference to local K-12 administrators' judgment. In upholding substantial powers of district courts to fashion remedies for school desegregation in *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court nevertheless emphasized that "[s]chool authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students."[64] In so stating, the Court recognized that properly designed voluntary integration plans can meet the high burden of addressing a compelling governmental interest. Following *Swann*, in which illegal racial segregation was alleged, the Supreme Court in *Milliken v. Bradley* stated that "[n]o single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process."[65] The Court further observed that "local control over the educational process affords citizens an

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[61] COLO. CONST. art. IX, § 2.

[62] Grutter v. Bollinger, 539 U.S. 306, 328 (2003).

[63] *Id.*

[64] Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 16 (1971).

[65] Milliken v. Bradley, 418 U.S. 717, 741–42 (1974).

opportunity to participate in decision-making, permits the structuring of school programs to fit local needs, and encourages 'experimentation, innovation, and a healthy competition for educational excellence.'"[66]

2. *Discretion Granted in Other Education Cases*

The Supreme Court's deference to school administrators and local decision makers has not been limited to desegregation cases. In several other cases involving education, the Court has been quick to defer to local judgment and to explain the rationale for doing so.[67] In holding that disparities in school funding do not violate equal protection, the Court declared that when it comes to the "difficult questions of educational policy . . . [the] Court's lack of specialized knowledge and experience counsels against premature interference with the informed judgments made at the state and local levels."[68] Again, in a case addressing the services that a school must provide for a deaf child, the Court cautioned that the judiciary must be careful not to impose its "view of preferable educational methods upon the States."[69]

Notably, the circuit and district courts have consistently granted discretion to local educational agencies. In deferring to a school district's judgment regarding the appropriate programs for students with limited proficiency in English, a Northern District of California trial judge, citing a Fifth Circuit case, warned "that courts should not substitute their educational values and theories for the educational and political decisions properly reserved to local school authorities and the expert knowledge of educators, since they are ill-equipped to do so."[70]

Preparing our nation's students to function effectively in the workplace within the United States' diverse society is such an important goal that it must be addressed by those entities best equipped to develop and execute an appropriate plan. This means that school administrators must be free to factor in the individual needs of their particular schools. K-12 schools should not be hemmed in by a traditional strict scrutiny analysis which is inapplicable within this unique context.

Under *Grutter* and long-standing judicial precedent granting deference to local control of school districts, K-12 districts should be allowed to devise

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[66] *Id.* at 742 (quoting San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 50 (1973)).

[67] *See, e.g.*, Regents of the Univ. of Mich. v. Ewing, 474 U.S. 214, 225–26 (1985).

[68] *Rodriguez*, 411 U.S. at 42.

[69] Bd. of Educ. of Hendrick Hudson Cent. Sch. Dist., Westchester County v. Rowley, 458 U.S. 176, 207 (1982).

[70] Teresa P. v. Berkeley Unified Sch. Dist., 724 F. Supp. 698, 713 (N.D. Cal. 1989) (citing Castaneda v. Pickard, 648 F.2d 989, 1009 (5th Cir. 1981)).

voluntary integration plans that address racial equity and integration. Building on their educational expertise and judgment, K-12 schools are uniquely equipped to provide their students with the skills, both academic and cultural, necessary to function effectively in a multicultural environment.

III. SPECIAL TREATMENT OF CONSTITUTIONAL ANALYSIS WITHIN THE CONTEXT OF PUBLIC SCHOOLS

Special deference to K-12 schools is not limited to substantive educational rulings. A substantial line of case authority indicates that the Supreme Court's rulings regarding constitutional issues in schools are greatly influenced by a consideration of the setting in which the school's actions are taken.[71]

A. *First Amendment Analysis in Public Schools*

Judicial protection of a citizen's First Amendment right to free speech strikes at the very heart of the United States Constitution. And yet, the Supreme Court has, in the name of inculcating fundamental values in public schools, allowed a flexible application of its dictates.[72] While students do not shed their right to free speech at the schoolhouse gate, a student's right to express himself or herself is limited by the special characteristics of the school environment.[73]

For example, the Supreme Court ruled that it is constitutionally permissible for a school to punish a student for indecent speech.[74] The Court reasoned that schools are responsible for inculcating civilized discourse in students and, therefore, must be allowed to punish profane and indecent language.[75] The *Fraser* decision recognized the important role which schools play in teaching citizenship, noting, "The process of educating our youth for citizenship in public schools is not confined to books, the curriculum, and the civics class; schools must teach by example the shared values of a civilized social order."[76]

The Court's decision also rested on another recurring theme in public school cases: judicial deference to local educational institutions to make

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[71] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648–49 (1995); Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

[72] *Fraser*, 478 U.S. at 683.

[73] *Tinker*, 393 U.S. at 506; *Fraser*, 478 U.S. at 683.

[74] *Fraser*, 478 U.S. at 683.

[75] *Id.*

[76] *Id.*

policy decisions.[77] The Court noted that the determination of what manner of speech is appropriate in the classroom or in a school assembly properly rests with the school board.[78]

Ultimately, the Court in *Fraser* ruled that the First Amendment does not protect speech in the education setting because even though vulgar or lewd speech in and of itself may be protected, the context in which it takes place, (i.e., in school in front of children) militates toward protecting the children over the rights of the speaker.[79]

B. *Fourth Amendment Analysis in Public Schools*

Similarly, the Supreme Court has not applied traditional Fourth Amendment review to cases in the K-12 public education setting. In *Vernonia School District 47J v. Acton*, the Court reviewed a decision by the Ninth Circuit that held unconstitutional a drug testing policy for a high school athletic program.[80] In that case, an Oregon high school had reason to believe that student athletes were leaders in a school-wide drug culture that led to an increase in disciplinary problems, vandalism, and suspensions.[81] In order to curb some of the drug use, the school district implemented a student athlete drug testing policy.[82] The case was brought by a student who refused to submit to a drug test, stating that it was a violation of his rights under, *inter alia*, the Fourth Amendment's guarantee of freedom from unreasonable searches.[83]

In reviewing the Fourth Amendment issue in the school setting, the Court acknowledged that there was neither a warrant nor probable cause, but stated that when "special needs" exist, having a warrant or probable cause would be impracticable.[84] In the example of a public school, special needs exist

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[77] *Id.*

[78] *Id.*

[79] *Id.* at 684; *see also* Virgil v. Sch. Bd., 862 F.2d 1517, 1521 (11th Cir. 1989) (holding that the First Amendment does not prevent a school board from removing a previously approved textbook from an elective high school class because of objections to the material's vulgarity and sexual explicitness, and stating that a school board may, without contravening constitutional limits, take such action when its methods are "reasonably related to legitimate pedagogical concerns").

[80] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 648 (1995).

[81] *Id.* at 648–49.

[82] *Id.*

[83] *Id.* at 651. Also, by the time the Supreme Court reviewed this case, it had already determined that state-compelled collection and testing of urine constituted a search subject to the protection of the Fourth Amendment. *See* Nat'l Treasury Employees Union v. Von Raab, 489 U.S. 656, 665 (1989).

[84] *Vernonia*, 515 U.S. at 653.

because "'strict adherence to the requirement that searches be based upon probable cause' would undercut 'the substantial need of teachers and administrators for freedom to maintain order in the schools.'"[85]

Because the subjects of the drug policy were children who were "committed to the temporary custody of the State as schoolmaster,"[86] the district was "permitt[ed] a degree of supervision and control that could not be exercised over free adults."[87] This is not an anomaly in the Court's jurisprudence. Rather, the Court has clearly created a rule that under the Fourth Amendment, the K-12 school setting receives a lower level of scrutiny than do adults or arguably even college students, who may be less than a year older than their high school counterparts.[88] This difference in application of the strict scrutiny standard is yet another illustration of the need to consider the unique K-12 environment in order to arrive at the most appropriate decision when public school policies are involved.

IV. NARROWLY TAILORED ANALYSIS

Once racial integration in K-12 schools is acknowledged to be a compelling governmental interest, the courts must determine whether a particular voluntary integration plan is narrowly tailored to serve that interest, considered within the applicable context.[89] In order to be found narrowly tailored, the governmental body has the burden of proving that its plan is the least restrictive means necessary to further that interest.[90] *Grutter* explained that the purpose of this "requirement is to ensure that 'the means chosen "fit" th[e] compelling goal so closely that there is little or no possibility that the motive for the classification was illegitimate racial prejudice or stereotype.'"[91]

Grutter outlined a four-criteria framework to assess whether race-conscious university admissions programs are narrowly tailored to withstand strict scrutiny.[92] The program must: (1) consider alternative race-neutral policies, (2) be limited in duration, (3) not unduly burden individuals who are

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[85] *Id.* (quoting New Jersey v. T.L.O., 469 U.S. 325, 341 (1985)).

[86] *Id.* at 654.

[87] *Id.* at 655.

[88] *Id.* at 653; *T.L.O.*, 469 U.S. at 341–42 (1985).

[89] Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

[90] Miller v. Johnson, 515 U.S. 900, 922 (1995); Burson v. Freeman, 504 U.S. 191, 197 (1992).

[91] *Grutter*, 539 U.S. at 333 (alteration in original) (quoting Richmond v. J.A. Croson Co., 488 U.S. 469, 493 (1989) (plurality opinion)).

[92] *Grutter*, 539 U.S. at 333.

not members of the favored racial groups, and (4) look at applicants as individuals rather than create a quota system.[93]

Because the Supreme Court has never heard a constitutional challenge to a K-12 voluntary integration plan, it is not known exactly how the Court would factor context into this particular strict scrutiny analysis.[94] While the analysis discussed in *Grutter* does indeed provide a useful framework, the Court's inquiry in that case was specific to a competitive application process at the university level.[95] As such, the factors were tailored for that environment.

In order to accurately conduct a constitutional analysis of K-12 schools, the *Grutter* narrowly tailored factors must be customized and adapted to fit this unique context. As recently stated by the First Circuit in *Comfort* and the Ninth Circuit in *Parents Involved*, the narrow tailoring inquiry is inherently a context-specific analysis which "must be 'calibrated to fit the distinct issues raised' in a given case, taking 'relevant differences into account.'"[96]

A. *Alternative Means*

Under *Grutter*, for an integration plan to be considered narrowly tailored, the school must first give sufficient consideration to racially-neutral alternatives.[97] The test involves a good faith examination of workable alternatives but does not require a school to exhaust every conceivable race-neutral option.[98] In *Grutter*, the Court rejected the idea of forcing the law school to further consider a lottery system or to decrease academic standards as race-neutral ways of achieving its goal of a diverse student body.[99] Such alternatives, the Court noted, "would require the Law School to become a much different institution" and would preclude it from conducting the individualized assessments necessary to assemble a student body that is in line with all the qualities valued by the university.[100] In so doing, the Court continued the judicial tradition of granting deference to educational institutions for policy-related decisions.

While racially neutral policies may be a suitable consideration for law school admissions, they are not an appropriate policy within the context of

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[93] *Id.* at 342.

[94] *Id.*

[95] *Id.*

[96] Comfort v. Lynn Sch. Comm., 418 F.3d 1, 16 (1st Cir. 2005) (en banc); Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1180 (9th Cir. 2005) (en banc).

[97] *Grutter*, 539 U.S. at 333.

[98] *Id.* at 339.

[99] *Id.* at 340.

[100] *Id.*

K-12 voluntary integration plans. Relying solely on racially neutral policies has simply not proven successful in preventing racial segregation in the K-12 arena. Realistically, race *must* be taken into account in order to address this compelling government interest. The goal is in fact *racial* diversity, and not viewpoint or subject matter diversity, as may be the case in other constitutional challenges. Consideration of alternative means may remain a component of the narrowly tailored analysis. It is also essential to realize, however, that such alternatives may never adequately lead the district to achieve the ultimate goal of racial diversity.

The circuit courts are beginning to address this reality. The *Comfort* case provided a narrowly tailored analysis that acknowledged that K-12 diversity policies need not consider racially neutral alternatives.[101] In that case, the First Circuit saw "no reason to impose a blanket prohibition on the use of race as a decisive factor in a student transfer plan to further a compelling interest in obtaining the educational benefits of racial diversity."[102] As such, the First Circuit both acknowledged that attaining racial diversity is a compelling government interest, and permitted the direct use of race to further this goal.[103]

Similarly, in *Parents Involved*, the Ninth Circuit acknowledged that both promoting racial diversity to improve the quality of education and avoiding replicating housing segregation in schools are compelling state interests in their own right.[104] To attain these compelling goals, the court allowed a school district to use race as a tie-breaking factor in student assignments.[105] Of the Seattle schools' use of race to improve racial integration, the court wisely noted, "The logic is self-evident: When racial diversity is a principal element of the school district's compelling interest, then a narrowly tailored plan may explicitly take race into account."[106] In response to the dissent's claim that "[t]he way to end discrimination is to stop discriminating by race," the Ninth Circuit majority plainly observed, "More properly stated, the way to end segregation is to stop separation of the races. The Seattle school district is attempting to do precisely that."[107]

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[101] *Comfort*, 418 F.3d at 12.

[102] *Id.* at 19.

[103] *Id.*

[104] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1179 (9th Cir. 2005) (en banc).

[105] *Id.* at 1191, 1193.

[106] *Id.* at 1191.

[107] *Id.* at 1191 n.34.

1. *Inefficacy of Using Non-Racial Criteria: The Resegregation of K-12 Schools*

Concrete examples illustrate school districts' failures to achieve racial diversity using racially neutral proxies or alternative yardsticks. San Francisco Unified School District implemented a court-ordered diversity plan in 2001 which mandated that the district eliminate racial and ethnic segregation. The district was charged "to achieve the broadest practicable distribution throughout the system of students from the racial and ethnic groups which comprise the enrollment."[108] Despite the court's obvious goal of creating racially diverse schools, the order prohibited the district from using race as a factor in student placement.[109] Instead, the district was forced to rely upon factors such as academic achievement scores, parents' educational background, language proficiency, home language, and the ranking of a student's previous school.[110] As a result, an independent review conducted in 2003 revealed that student assignment in San Francisco was not achieving the racial diversity contemplated by the court's order.[111]

Instead, one year into the new assignment plan, thirty-four schools were severely *resegregated* at one or more grade levels, meaning that the school's population consisted of 60% or more of one race or ethnicity.[112] The independent reviewing committee sympathized with the district's ironic position: it was ordered to desegregate its schools but denied the logical use of race in developing a diversity plan to do so.[113] As a result of these artificial constraints, the school populations became "diverse" by the standards measured by the index, but were severely segregated when measured by race.

The grim reality of the current situation in K-12 education is that the gains made after the pronouncement of *Brown v. Board of Education* have been quickly eroding. The rapid resegregation of our nation's schools by race and socioeconomic status has been documented by various researchers. Most prominently, Dr. Gary Orfield's comprehensive study reveals that the nation has been headed toward increased segregation for black students over the past decade. The study also revealed that for Latinos, the largest group of minority students, segregation has been steadily increasing, in part because

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[108] STUART BIEGEL, SAN FRANCISCO UNIFIED SCHOOL DISTRICT DESEGREGATION: PARAGRAPH 44 INDEP. REV. REP. NO. 20 2002–2003 3–4 (July 31, 2003), http://www.gseis.ucla.edu/courses/edlaw/sfrept20.pdf.

[109] *Id.* at 5.

[110] San Francisco Unified School District Public School Enrollment Fair, 1, http://portal.sfusd.edu/data/epc/DILottery.pdf (last visited Feb. 27, 2006).

[111] BIEGEL, *supra* note 108, at 4.

[112] *Id.*

[113] *Id.*

there has never been any significant enforcement of school desegregation for Latinos.[114]

The grave concern over this trend toward resegregation is appropriate. Numerous courts and commentators recognize that education in racially isolated schools is qualitatively inferior to that of an integrated education.[115] Dr. Orfield notes that "the vast majority of intensely segregated minority schools face conditions of concentrated poverty, which are powerfully related to unequal educational opportunity."[116] Moreover, in racially segregated schools, unequal distribution of resources continues.[117] In addition, national statistics reveal that only a small fraction of underrepresented minorities are graduating from high school with the necessary preparation to go to college.[118]

Just as the *Grutter* Court deferred to educators in determining whether race-neutral alternatives were effective and which alternatives to consider, so too should a similar rationale be applied in the K-12 context with race being considered only after other student assignment mechanisms have failed to achieve a "critical mass" of underrepresented minorities. Geographic zones or alternative remedies suggested by the judiciary are merely subterfuges for race.[119] It simply does not make sense to sanction indirect consideration over direct consideration of race.

Due to the unique K-12 environment, race must be factored into any diversity plan. Looking at students' other characteristics will not solve the problem of racial segregation. To effectively implement a voluntary integration plan, K-12 school districts *must* consider race at the outset. Thus, the other *Grutter* elements of flexibility, burden on third parties, and duration should be the primary factors in assessing whether a voluntary integration plan is narrowly tailored.

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[114] ORFIELD & LEE, *supra* note 37, at 3.

[115] *See, e.g.*, Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1 (1971); Comfort v. Lynn Sch. Comm., 418 F.3d 1 (1st Cir. 2005) (en banc); Beth A. Young & Thomas M. Smith, *The Social Context of Education*, *in* THE CONDITION OF EDUCATION 1997 2, 11 (Rebecca Pratt ed., 1997), http://permanent.access.gpo.gov/lps2522/1997/97388.pdf; Catherine Freeman, Benjamin Scafidi & David Sjoquist, *Racial Segregation in Georgia Public Schools 1994-2001: Trends, Causes and Impact on Teacher Quality*, at 30 (Fiscal Res. Program, Rep. No. 78, Dec. 2002), http://frp.aysps.gsu.edu/frp/frpreports/Report_77/Rpt77text.pdf.

[116] ORFIELD & LEE, *supra* note 37, at 3.

[117] *Id.*

[118] *Id.*

[119] Eisenberg v. Montgomery County Pub. Sch., 197 F.3d 123, 134 (4th Cir. 1999) (holding that although the county considered multiple factors in evaluating a student's transfer request, the county's conduct was unconstitutional, as the transfer was denied because of the student's race).

B. *Flexibility*

In terms of flexibility, the *Grutter* Court emphasized that applicants must be looked at as individuals, rather than grouped together on the basis of classifications such as race or ethnicity.[120] Similarly, in *Regents of the University of California v. Bakke*, the Supreme Court reaffirmed that race-conscious admissions programs could not create a system of quotas in which minorities compete against one another for a certain number of admissions slots.[121] However, the Court still recognized that attaining a diverse student body is a substantial state interest.[122] The *Bakke* Court held that race could be considered in admissions so long as it was only considered a "plus" in a particular applicant's file.[123] In *Grutter*, the University of Michigan Law School's admissions policy withstood the flexibility criterion because it considered all pertinent elements of diversity in light of the particular qualifications of each applicant.[124]

While such an analysis may be appropriate in the competitive university application process in which there are far more applicants than there are spaces available, individualized assessment is not applicable in the K-12 context, as a public education is available to everyone. The fact that no one is denied a free, public K-12 education lessens the need for individualized review of students in a voluntary integration plan. This is particularly true because schools are theoretically homogeneous, especially within districts that are fairly well standardized. In addition, given that schools are now subject to similar standards, such as those created by the No Child Left Behind Act, which seeks to create uniform curricula and achievement measurements, waiver and hardship are sufficient ways to provide flexibility.[125] Such mechanisms can be easily incorporated into a voluntary integration plan to allow students and their parents the input they need to ensure that racial considerations are able to exist harmoniously with the flexibility to look at other narrowly tailored factors.

C. *Burden to Third Parties*

Most importantly, the *Grutter* test for narrowly tailored plans requires that a race-conscious admissions program not "unduly burden" individuals

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[120] Grutter v. Bollinger, 539 U.S. 306, 333 (2003).

[121] *See* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[122] *Id.* at 320.

[123] *Id.* at 317.

[124] *Grutter*, 539 U.S. at 340.

[125] 20 U.S.C. § 6301 (Supp. II 2002).

who are not members of the favored racial and ethnic groups.[126] The *Grutter* Court was satisfied that the law school's policy did not unduly burden nonminority students because the policy considered "all pertinent elements of diversity," not just race, as a plus factor.[127]

Within the context of K-12 schools, the consideration of burden to third parties takes on an entirely different interpretation. Because the system-wide goal of an enhanced educational experience is served by diversity, *all* students benefit by an assignment which ensures that schools have a "critical mass" of racial and ethnic groups represented in a district.[128] Also, because assignment mechanisms are uniformly applied to all students in voluntary integration plans, this is not a situation of discriminatory or preferential treatment for any particular race or student. Unlike in universities, there is no scarce resource being allocated by assignment within K-12 schools.

The Ninth Circuit recently affirmed that every student is entitled to receive a high school education that meets state standards, but is not entitled to attend a specific school.[129] In *Parents Involved in Community Schools v. Seattle School District, No. 1*, parents challenged the consideration of race in an assignment plan for "oversubscribed" high schools. The court noted that "it is undisputed that the race-based tiebreaker does not uniformly benefit one race or group to the detriment of another."[130] The court concluded that the use of race in determining student assignment does not unduly harm any student in the district.[131] In fact, even the parents who brought suit against the district acknowledged that all students benefit from increased contact with children of other races.[132]

D. *Duration*

The fourth criterion is that race-conscious admissions be limited in time so as not to offend the fundamental principle of equal protection.[133] The *Grutter* Court reasoned that although there may still be a compelling state interest in diversifying universities, racial classifications are potentially so dangerous that they cannot be employed more broadly than the interest

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[126] *Grutter*, 539 U.S. at 341.

[127] *Id.*

[128] Hallinan & Smith, *supra* note 47, at 3–16.

[129] Parents Involved in Cmty. Sch. v. Seattle Sch. Dist., No. 1, 426 F.3d 1162, 1191 (9th Cir. 2005).

[130] *Id.* at 1192.

[131] *Id.*

[132] *Id.*

[133] Grutter v. Bollinger, 539 U.S. 306, 341 (2003).

demands.[134] The Court suggested periodic reviews and a sunset date of twenty-five years to end the use of racial preferences in higher education.[135]

The interests pronounced and the legal analysis supporting *Grutter* extend beyond higher education and beyond an arbitrary limitation of time when applied to K-12 education. However appropriate this sunset provision may be for law school admissions procedures, this timeline fails to adequately account for this country's long-standing history of racial segregation and disparity, the deficiencies of integrated settings in social and housing environments, and the complicated backdrop of the *Brown* progeny.

In order for K-12 schools to properly prepare students to live in a democracy free from racial bias and discrimination, the underlying policy implication of *Grutter* must be expanded rather than constricted. If the goal of racially integrated public education is to be achieved and maintained, twenty-five years is simply not sufficient, absent remarkable, unprecedented societal change. Rapid *resegregation* is currently denying equal opportunities to students and is widening the chasm between those who are prepared for a college education and those who are not.[136] The No Child Left Behind Act is actually documenting the drastic inequalities between "successful" schools and those schools identified as "failing."[137] All too frequently, the "failing" schools are the same schools that are racially segregated.[138]

Further, schools need more time to achieve racial diversity because our courts have not yet begun to fully address the types of segregation occurring nationwide. The 1954 *Brown* decision attempted to reverse the damaging effects of segregation of black Americans in the South.[139] Fifty-plus years later, studies show that any steps taken toward the goal of integrating black students into racially diverse schools are now being reversed amidst a trend of *resegregation.*[140] What then does this mean for the integration of Latino students, about whom the Supreme Court said nothing until nineteen years after *Brown* and for whom there has never been a significant desegregation enforcement?[141]

Unlike remedial contexts, in which restorative acts must have a definite termination point after the victim has been returned to the position she would have occupied absent the discrimination, a nonremedial justification needs to be continued as long as necessary to further that interest. Duration is thus

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134 *Id.*

135 *Id.*

136 ORFIELD & LEE, *supra* note 37, at 9.

137 *Id.*

138 *Id.*

139 Brown v. Bd. of Educ., 347 U.S. 483, 495 (1954).

140 ORFIELD & LEE, *supra* note 37, at 2.

141 *Id.*

fundamentally intertwined with the educational policy decisions regarding the desire for an integrated educational environment. Due to the tremendous influence of geographic factors and housing patterns, it is not clear that school districts can set fixed deadlines. Therefore, plans that promote K-12 diversity may be necessary for a period that exceeds any timeline set for higher education institutions. While K-12 districts should monitor housing patterns and other data to determine whether continued consideration of race is necessary, integration plans must be created with an acceptance of the reality that K-12 racial diversity is a long way from being fully realized.

V. CONCLUSION

In the five decades since *Brown v. Board of Education* heralded an era of desegregation and racial integration in our nation's public schools, much progress remains to right the wrongs of de jure and de facto segregation. Sociological data indicate an alarming trend of *resegregation* in certain areas, and true racial integration remains a distant goal for many school districts.

In its *Grutter* decision, the Supreme Court opened the possibility for K-12 schools to survive strict scrutiny while still using critically relevant race as a factor in promoting racial integration. The *Grutter* Court affirmed that students benefit from racially integrated education in a higher education context and that race may be used if the means are narrowly tailored to the important goal. In so doing, the Court invited K-12 schools to assert and defend their own compelling interests in promoting racial diversity as an educational foundation for good citizenship in an increasingly diverse nation and world.

The First and Ninth Circuits, each sitting en banc, have recently responded to this opportunity by upholding two districts' use of race as a factor to achieve racial diversity in K-12 schools. By modifying the *Grutter* analysis to the elementary and secondary school context, the *Comfort* and *Parents Involved* courts affirmed that racial integration and diversity are compelling state interests. The courts allowed the districts to use race itself to achieve these important goals, provided that the means fit the general narrowly tailored criteria propounded in *Grutter*.

The Supreme Court's jurisprudence counsels particular deference to school administrations in identifying educational goals, and the means to reach them. History shows that the twenty-five year goal espoused by the Supreme Court may not be sufficient time to transition to a total "color blind" system, given that ten years after *Brown*, schools in the South were not even remotely integrated, and fifty years after *Brown*, the debate over similar racial issues and racial disparities and the best methodology for ensuring fairness still remains. However, these issues and this debate are

even more important for K-12 students because these are the critical formative years for students who are shaping the future.